Neutral Citation Number: [2021] EWHC 2037 (Admin)

Case No: CO/207/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th July 2021

Before :
MR JUSTICE FORDHAM
- -
Between :

TOMASZ BOGDANSKI	**Appellant**
- and -	
ELBLAG REGIONAL COURT (POLAND)	**Respondent**

- -
- -

Ania Grudzinska (instructed by AMI International Solicitors) for the **Appellant**
Rebecca Hadgett (instructed by the CPS) for the **Respondent**

Hearing date: 13.7.21

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Approved Judgment

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM :

Introduction

1. This is an extradition appeal on Article 8 grounds, with permission of Morris J granted on 10 June 2021. The Appellant is aged 36 and is wanted for extradition to Poland. The mode of hearing was an in-person hearing at the Royal Courts of Justice.

Stays pending lead cases

2. There has been in this case an application for permission to appeal on the familiar section 2/Article 6 Wozniak/ Chlabicz ground of appeal, which Mostyn J stayed on the usual terms on 6 May 2021. There is before me an application to amend the grounds of appeal to add the (now also familiar) Article 3 prison conditions ground of appeal, which it is common ground that I should stay on the usual terms, as I do. I will order as follows: "(1) The application for permission to amend in respect of Article 3 ECHR is stayed pending the decision of the Divisional Court in Litwinczuk CO/3399/2020 Lukaszek CO/3852/2020 and Tadaszak CO/3941/2020. (2) The Appellant shall, within 14 days following the handing down of the judgment of the Divisional Court in those cases, inform the Court and the Respondent whether he intends to pursue an application to renew in respect of the Article 3 ground. (3) If an application to renew in respect of that ground is renewed, the Appellant shall by the same deadline file brief submissions in support of the Article 3 ground." It is common ground that this Court should deal today with the Article 8 ground of appeal, to which I turn.

Background

3. The Appellant's extradition is sought by the Polish authorities pursuant to a conviction EAW issued on 26 September 2019 and certified on 24 March 2020. He has 12 months and 28 days' time in custody to serve. That is the remaining balance of a 16-month suspended sentence imposed by a Polish court on 24 February 2012, originally suspended for 5 years, subsequently activated and served in part. The index offending took place between 2007 and 2010, when the Appellant was aged 22 to 25. That offending involved (a) supply of Class A drugs (heroin: 15g overall) to three named individuals (one of whom was also supplied with cannabis) on at least 60 occasions (at least 30 occasions for one individual; at least 15 occasions for each of the other two individuals) and (b) possession of a Class A drug (heroin) on 14 September 2010 (2.854g). The 16-month custodial sentence, originally suspended for 5 years, was activated on 17 October 2013. That was because the Appellant had committed further offences of affray (28 April 2012) and criminal damage (13 October 2012), putting him in breach. The Appellant began serving the 16-month custodial sentence on 9 April 2014. On 10 July 2014 he was temporarily released from prison on leave, granted to him for a period of 12 months in order to look after his mother, he being required to surrender to custody on 10 July 2015 which he was duly summonsed (3 July 2015) to do. During that period of prison leave (January 2015), the Appellant came to the United Kingdom.

The hearing below

4. Extradition was ordered by District Judge Hamilton on 15 January 2021 after an oral hearing on 18 December 2020 at which oral evidence was given by the Appellant and

his partner (who I am going to call "the Partner" rather than give her name). The evidence was that the Partner, who also originates from Poland and is now aged 35, had come to the United Kingdom in September 2010, from which time she was working and supporting herself. Their relationship began in 2015 after the Appellant came to the United Kingdom. There was evidence from the Partner and the Appellant concerning the Partner's mental health problems and the anti-depressant medication which she has been prescribed. There was also a section 9 witness statement from the Appellant's 71-year-old mother in Poland, describing the monthly financial help which the Appellant has been providing and her reliance on it. Documentary evidence including a reference from the Appellant's employer which describes the Appellant's hard work and commitment, reliability and trustworthiness, over the five-year period in which he has been in the UK, rising to a supervisory role within a packing and distribution business.

The law

5. Ms Grudzinska for the Appellant reminds me of the leading authorities in relation to Article 8 and extradition. The District Judge had those well in mind, citing in particular Norris [2010] UKSC 9, HH [2012] UKSC 25 and Celinski [2015] EWHC 1274 (Admin). Ms Grudzinska cites, as 'working illustrations', three cases involving fugitives in which this Court allowed extradition appeals on Article 8 grounds: Juchniewicz [2013] EWHC 1528 (Admin); Podolski [2013] EWHC 3593 (Admin); Adamek [2018] EWHC 578 (Admin). Cases in this area are intensely fact-specific but Ms Hadgett makes no criticism of Ms Grudzinska for putting 'working illustrations' before the Court and neither do I.

The appeal

6. Ms Grudzinska focused her submissions on three areas all involving features weighing against extradition, which she says the District Judge failed to address or underplayed or to which the District Judge attributed insufficient weight (and in one case, she says, made a material error of law). She also says that – stepping back and looking at the position overall – the outcome was wrong. Ms Hadgett submits that the District Judge made no error as to any feature or features, and that – stepping back and looking at the position overall – the outcome was in any event right. The Venn diagram of their submissions thus has, as its overlap area, the shared recognition that this Court can step back and look at the position overall, in the round, in order to see whether the outcome arrived at by the District Judge was 'wrong'.

Delay

Culpable Delay

7. This was the first area on which Ms Grudzinska focused. She put the delay point in two ways. First, she identified three periods of delay which she said were "unexplained" and so are by inference "culpable" (Adamek paragraph 16), with which the District Judge failed to deal. She fairly accepts that this is not how the argument was put at the hearing before the District Judge, which itself explains why his judgment does not address it. She invites this Court to do so and I will. But I bear in mind that one of the reasons why points need to be squarely taken during the extradition process is so that the Respondent has a fair opportunity to deal with anything said to be concerning. The first period is that between the final offence of heroin possession (14 September 2010)

and the imposition of the sentence (24 February 2012). That is a period of 17 months. There is no evidence from the Appellant such as to raise a question-mark about this: for example, that he was caught red-handed on 14 September 2010 and pleaded guilty at a first court appearance on 24 February 2012. I do not have, and do not need, visibility on how the Polish authorities pursued an investigation which included 3 years of heroin dealing to three individuals on multiple occasions. This period of time cannot support an inference of culpable delay capable of weighing in the balance for Article 8 purposes. The second period is that between 13 October 2012 when the Appellant committed the offence of criminal damage and the hearing on 17 October 2013 at which his suspended sentence was activated by the Polish court. The same applies to this. There is no evidence from the Appellant to the effect that the authorities knew on 17 October 2013 everything they needed to know about the April 2012 affray and the October 2012 criminal damage. The Court does not need detail as to what happened during this period. It is, on its face, a period of time consistent with a properly working criminal justice system. The third period is that between the Appellant's failure to surrender and resume his prison sentence on 10 July 2015 and the issue of the EAW on 26 September 2019. Ms Grudzinska emphasises that the Polish authorities had the Appellant's mother's address, having sent notification of the activation to that address in October 2013. She emphasises a passage in the Further Information which refers to an order to seek the Appellant's whereabouts on 12 August 2016 and then makes reference to the authorities "having obtained in the course of the seeking activities the information that the convict may have been residing within the territory of one [of the] EU Member States". That phrase, read fairly, is saying that the EAW was issued (in 2019) having by then obtained that information. Again, this delay cannot properly be inferred, absent explanation, to have been "culpable". The Appellant was a fugitive from Polish justice who had not notified that he was leaving or where he had gone. This case is very far removed from the 7 years in Adamek at paragraph 16 (five years in sending the EAW to the UK authorities; 2 years in their certification); and the 7 years plus 5 years in Juchniewicz at paragraph 2 and 4 (7 years from offence to arrest, and 5 years from activation to EAW).

Passage of Time

8. The second way the delay point is put, is as follows. The passage of time features in the Article 8 proportionality assessment, in two ways. One is that it can tend to weaken the public interest in extradition. The second is that it can tend to strengthen the factors on which reliance can be placed as capable of counting against extradition. These are points emphasised in Lady Hale's oft-cited paragraph 8 in HH, a case to which the District Judge referred. There was no error of approach or misappreciation. The District Judge accurately recorded the chronology and had it well in mind. He regarded the public interest considerations in favour of delay in this case as being powerful features – that is, not substantially diminished by the passage of time, given the Appellant's conduct. He expressly evaluated the Appellant's "settled private life in the UK", as a "valued employee", with no "criminal convictions whilst in the UK", having been "'sober for almost 6 years", and the circumstances of being in the UK "for almost 6 years now", "in a relationship" and providing his partner "with emotional and financial support". These are all practical illustrations of having close regard to the way in which circumstances arising from the passage of time feature in the Article 8 balance sheet. There was no error of approach. The question is whether the 'in the round' assessment of the outcome was 'wrong'.

Position of third parties

9. This is the second area on which Ms Grudzinska focused. She submitted that the District Judge downplayed the Partner's mental health issues when (and because) he said: "It is undeniable that [the Partner] coped without [the Appellant] … emotionally before they met"; and concluded that extradition would "cause some emotional harm". Ms Grudzinska says the comparison was a false one: the Partner's mental health issues were in the present, not the past, and were evidenced by the prescription medication for depression. She submits that the District Judge failed to acknowledge and adequately weigh the impact on the Partner if back in Poland given the distant relationship with her mother there and the lack of contact with her father. Ms Grudzinska submits that the District Judge was wrong to characterise the mother's evidence as having "asserted that she would struggle to manage financially without" the support from the Appellant, and had been "able to cope financially before [the Appellant] moved to the UK", given the section 9 statement from the mother that "I am unable to pay for my living expenses without my son's financial support" and the absence of any application for remote attendance from Poland for cross-examination, meaning this evidence was "agreed". Ms Grudzinska submits that there is a relevant link between the Appellant having come to the UK in January 2015 to work, and the purpose of the one-year prison leave (from July 2014) for the Appellant to look after his mother, which he has been doing through important monthly financial support which she will now lose. These impacts were not adequately reflected in the judgment or not given sufficient weight. Finally, Ms Grudzinska characterises as a material error of law the District Judge's description of the Article 8 rights of the Appellant and the Partner as being "engaged", without recognising that the mother's Article 8 rights were also engaged by reason of the loss of ongoing financial support.

10. In my judgment, there was no error of approach or misappreciation by the District Judge in relation to these features of the case and the impacts on the Partner and the mother. As to the Partner, the District Judge accepted that: "It is clear that she has been experiencing mental health difficulties". He referred to the evidence of being prescribed anti-depressants. That was a clear recognition of the present position. The District Judge assessed, and then weighed in the balance, the position as to those "clear … mental health difficulties", properly identifying: that the Partner had been to see a private GP about her mental health, but had done so only once; that there was no independent confirmation of a medical condition, beyond the prescription of the medication; and that the Appellant himself had appeared to try to exaggerate the impact on the Partner "by claiming that she had been delay as word seen a psychiatrist three times when the Partner had seen a GP once". To this, he added the fair point that the Partner had coped without the Appellant, both financially and emotionally, before they met. It was open to the District Judge, having heard oral evidence and in an evaluation of all the evidence, to identify the impact as "some emotional harm". Turning to the mother, I accept the submission of Ms Hadgett that the District Judge was not obliged to treat this part of the section 9 statement as an "agreed fact", but rather he had to consider it against the rest of the evidence having regard to the absence of cross-examination. It was a fair statement to say that the Appellant "send money back to his mother in Poland" and she had "asserted that she would struggle to manage financially without that support". The District Judge made the relevant point that the Appellant "could not have been supporting her financially whilst in prison in Poland". That is the answer to Ms Grudzinska's submission that coming to the UK to work and support the mother was

consistent with the purpose of the prison leave in July 2014: caring for the mother on the one year's release from prison was always subject to a return to prison to serve the remainder of the sentence, ending that earning and any ongoing financial support, which is what the Appellant evaded by absconding, and is what he and his mother now face. I can see no material error of law in not identifying the impact of extradition on the mother as engaging her Article 8 rights to respect for family and private life. She was and would remain in Poland; there would be no 'rupture' of relationship; any effect on 'private life' was a function of the impact of losing monthly financial support from her son. That impact could properly be part of the proportionality evaluation and the District Judge included it in the section of the judgment on the "factors to be balanced". In my judgment, what matters ultimately – as both Counsel recognised – is the 'stand back' evaluation of the outcome, and whether it was 'wrong'.

Position of the Appellant

11. This was the third area on which Ms Grudzinska focused her submissions. But there was again no error of approach or misappreciation. The District Judge expressly recognised that the Appellant: "has been based in the UK for almost 6 years now"; that "he has not committed any criminal offences whilst here" and "has not acquired any criminal convictions whilst in the UK"; that "he has been employed by the same firm since he came to the UK"; that "he is highly regarded by his employer", "clearly valued by his employer" and "clearly a valued employer"; that "he is … the majority contributor to his and his partner's total income"; that he has successfully conquered his previous drug addiction and "he has been 'sober' for almost 6 years"; that he "has a settled private life in the UK". The District Judge clearly had well in mind the factors particularly emphasised by Ms Grudzinska, including the Appellant's rehabilitation from "using drugs" which had "led … to the convictions", the chronology including the Appellant's age at the time of the offending and now; and the productive and positive life he was leading in the UK; and what he, his employer and society would lose by his being extradited. Here again, what matters ultimately – again, as both Counsel recognised – is the 'stand back' evaluation of the outcome, and whether it was 'wrong'.

In the round

12. Ultimately, Ms Grudzinska submits that – stepping back and looking at the position overall and in the round – the outcome in this case was wrong. She emphasises all of the features of the case which I have already discussed. In essence, as I see it, it comes to this. This is a case of a 36 year old who has clearly successfully turned his life around. The offences are old. They took place between 11 and 14 years ago. The Appellant was in his early twenties, aged 22-25. He was at that time under the grip of a drug habit. Although he left Poland as a fugitive at the beginning of 2015, the fact is that his circumstances and contribution to society are transformed. He has a trusted and responsible, long-term job in which he has succeeded, and progressed, through hard work and commitment. He has no convictions at all for the last 9 years, and no convictions or cautions during his 5½ years in the UK. He has a settled and well-established relationship with his partner. She is reliant on him financially and emotionally, and has an evidenced mental health condition. His elderly mother relies on the monthly financial support which he has provided her since coming to the UK. So much will be lost – not only for the Appellant, but also for the Partner (and them as a couple), for the mother and also for the employer – if he is extradited. He is a responsible and productive member of society and in all the circumstances his

extradition is a disproportionate interference with the Article 8 private and family life of himself, his partner, and his elderly mother. There is a helpful parallel with the 'working illustration cases': Juchniewicz, a case of fugitivity and an activated suspended sentence for burglary of a shop; Podolski, a case of fugitivity and an activated suspended sentence (of two years custody) for theft of equipment and burglary of a flat, committed in his early 20s by the now-rehabilitated appellant; and Adamek, a case of fugitivity and an activated suspended sentence (of two years custody) for a street robbery. These are all cases concerning Poland. The Article 8 appeals were all successful. Like those appeals, this one should be allowed. The outcome was wrong. That is the essence of the argument.

Discussion

13. I am unable to accept these submissions. In my judgment, the outcome arrived at was one which was open to the Judge and was not wrong. Even if I adopt the most favourable approach to the Appellant, and revisit the evaluation of Article 8 proportionality afresh, conducting the weighing exercise myself – looking at all of the features of the case in the round – the outcome in this case was, in my judgment, correct.

14. The considerations and impacts to which Ms Grudzinska points – and which I do not need to repeat – are important features in the evaluative balancing exercise. On the other hand, neither the Appellant nor the Partner are the primary carer for a child or children and there are no impacts on children. In Podolski there was a four-year-old child whose mother would have to give up work and whose nursery place would be lost (paragraphs 4-5) and it was "the impact on the family in the United Kingdom" which tipped the scales (paragraph 10), when alongside the other features of the case. There were two young children in Juchniewicz and also in Adamek, alongside features such as the nature and extent of the delays. It is "clear" (as the Judge put it) that the Partner has mental health difficulties, evidenced by the prescription anti-depressants. On the other hand, this is not a case in which there is (even now – as Ms Hadgett pointed out) any documented external assessment of severe psychiatric or psychological harm. That is not a criticism. The Court has to assess severity and risk as it is, and on the basis of the evidence as it is. I have read the written evidence of both the Partner and the Appellant about this, as well as the points made in the District Judge's judgment about the oral evidence.

15. The offences in this case are relatively serious, being concerned with the possession and supply of class A drugs, and attracting a 16-month custodial sentence which was suspended to allow a chance for compliance. The Appellant, having not complied but having committed further offences, was properly required to serve that 16-month term. The period of custody remaining to be served is 13 months. That is not an insignificant period. There are strong public interest considerations in favour of extradition. They are not materially diminished by the passage of time. On the face of it, the Polish authorities have acted properly and pursued appropriate steps, in an appropriate way, throughout. The Appellant had begun to serve his custodial sentence, when he was given leave of absence from prison to look after his mother, but it was always the clear consequence of that decision that he would be required to surrender and serve the remainder of his custodial term: so, he "could not be supporting her financially whilst in prison in Poland". That is the nature of the impact on her, now. The Appellant came to the UK 6½ years ago. Having breached his suspended sentence (2012), leading to activation (2013), and having been given temporary leave of absence from prison

(2014) he came to the UK (2015) and did not return to serve the 13-month remainder of the sentence. He came here, knowing all of this. The public interest considerations linked to fugitivity, and the importance of the UK not being a safe haven for fugitives, are strongly engaged in this case. Everything that the Appellant and the Partner have built up since then has been in circumstances of his having absconded and his knowledge – which he was in a position to share with the Partner – that Polish justice would one day catch up with him. It has.

16. The roots and ties that the Appellant has in the United Kingdom, as a feature of the passage of time, are relevant in the balance. What he has done to turn his life around in the UK, as a productive, hard-working and responsible member of society in his mid-30s, rehabilitated and transformed from the drug-dependent criminality of his early 20s in Poland is hugely to his credit and highly relevant to the assessment. So is his age at the time of the index offending. So is the comparison with 'then and there' and 'now and here'. And so too is the real and appreciable hardship that he and his Partner in particular, but also his mother and his employer, will suffer from extradition. I do not belittle them. I have carefully considered them, assisted by what I have read and what Ms Grudzinska has submitted on the Appellant's behalf. But when this case is analysed, through the Article 8 proportionality prism as applicable in extradition cases, the cumulative effect of those factors weighing in the balance against extradition is, in my judgment, decisively outweighed by that of those weighing in favour of extradition. The outcome is not 'wrong', but is correct, and so the appeal on the Article 8 ground is dismissed. The Appellant will remain in the UK while the lead cases are resolved on the two issues on which stays have been granted. The parties invited me to order "costs reserved" so that costs can be addressed on the conclusion of the case, which I am content to do.

20.7.21